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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM ROBERTSON AITKEN,

Defendant and Appellant.

D037850

(Super. Ct. No. 099937)

APPEAL from a judgment of the Superior Court of San Diego County, Dana M. Sabraw, Judge. Affirmed.

William Aitken appeals from a judgment convicting him of second degree murder with personal use of a firearm and misdemeanor spousal battery. He asserts instructional and constitutional error arising from the trial court's giving of CALJIC No. 8.75 combined with the trial court's responses to jury questions. He also challenges the constitutionality of Evidence Code section 1109, which allows evidence of prior acts of

domestic violence in domestic violence cases, although he concedes this argument has already been rejected by the courts. We find no error and affirm the judgment.

FACTS

Seventy-nine-year-old William Aitken shot and killed his wife on the morning of July 8, 1999. Aitken and his wife had a long history of domestic violence in their marriage. Mrs. Aitken was contemplating divorce. A few days before the killing she had moved into a hotel and filled out papers for a temporary restraining order against Aitken. She was staying in the hotel under a different name and told the manager she was hiding from her husband. The day before the killing, Aitken checked his wife out of the hotel. Mrs. Aitken did not come up to the hotel desk or speak at the time of checkout but stood around the corner in the hallway.

Mrs. Aitken's body was found in the bedroom of their residence with wounds from three gunshots to her head and no defensive wounds on her hands. Her face was covered with a blood-stained white towel. The towel had gunshot residue and two holes which lined up with two of the bullet wounds on her face. Experts determined that the two wounds through the towel were shot from no more than six inches away from the towel. The third wound, which was caused by a bullet that entered and exited her head, was shot from one-half inch to one and one-half inch away from her head. A kitchen knife was found on the floor in the bedroom where her body was found.

Aitken testified that he woke up to find his wife leaning over the bed with a knife and screaming she was going to kill him. He grabbed her by the wrist, reached for a gun that was under his pillow, struggled with her and pushed her away, and fired. He put a

towel on her head to stop the bleeding. After leaving the bedroom to answer a knock on the garage door, he returned about five or ten minutes later. It looked like her body was in a different location and he thought she might not be dead. He shot her again because he thought she would be in pain or be a vegetable.

A crime reconstruction expert opined that the scene was contrived. The expert questioned whether the evidence was consistent with the killing having occurred in the bedroom, with a knife attack by Mrs. Aitken, or with Aitken attempting to stop the flow of blood with the towel.

Rejecting his claims of self-defense, imperfect self-defense, or provocation, the jury convicted Aitkin of second degree murder.

DISCUSSION

I. *CALJIC No. 8.75*

A. *Background*

The jury was instructed, and given verdict forms, regarding the charged offense of first degree murder and the lesser offenses of second degree murder and voluntary manslaughter.

CALJIC No. 8.75 requires the jury to acquit on a greater offense before returning a verdict on a lesser offense. (See *People v. Hernandez* (1988) 47 Cal.3d 315, 352.)

Aitken argues the trial court's giving of CALJIC No. 8.75, combined with the court's response to jury questions, misled the jurors to believe the offenses had to be considered in order from highest to lowest, and that they had to acquit on a higher offense before they could *consider* (as opposed to *return a verdict on*) a lower offense. He contends the

effect of the instructions and court's response was to prohibit the jury from considering voluntary manslaughter as an outcome. He also asserts his constitutional rights were violated because the jurors were not expressly told they must consider the lower offenses.

To evaluate his contentions of error, we consider the instructions as a whole.

(*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.)

1. *CALJIC* Nos. 8.72-8.75

The jury was first instructed regarding the definitions and differences between the crimes of first degree murder, second degree murder, and voluntary manslaughter. Along with these instructions, the jurors were told that if they found an unlawful killing but there was doubt whether it was murder or manslaughter, they must give the defendant the benefit of the doubt and find the killing to be manslaughter. (*CALJIC* No. 8.72.)

Further, they were instructed that if they found provocation but the provocation was not sufficient to reduce the homicide to manslaughter, they should consider whether the provocation had a bearing on whether the killing was with deliberation or premeditation. (*CALJIC* No. 8.73.) Next, the jurors were instructed that if they found an unlawful killing, before they could return a verdict, they had to unanimously agree whether it was first degree murder, second degree murder, or voluntary manslaughter. (*CALJIC* No. 8.74.)

After these instructions, the jurors were given the complained-of *CALJIC* No. 8.75. The trial court explained to the jury that *CALJIC* No. 8.75 "gives a road map as to how you should proceed with respect to these various counts and lesser crimes."

The jury was instructed in the language of CALJIC No. 8.75:

"If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime of first degree murder as charge[d] in count 1, and you unanimously so find, you may convict him of any lesser crime provided you are satisfied beyond a reasonable doubt that he is guilty of the lesser crime.

"You will be provided with guilty and not guilty verdict forms as to count 1, for the crime of murder in the first degree and the lesser crimes thereto. Murder in the second degree is a lesser crime to that of murder in the first degree. Voluntary manslaughter is a lesser crime to that of murder in the second degree.

"Thus, you are to determine whether the defendant is guilty or not guilty of murder in the first degree or any lesser crime thereto. *In doing so, you [have] discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it to be productive to consider and reach tentative conclusions on all charged and lesser crimes before reaching any final verdicts.*" (Italics added.)

CALJIC No. 8.75 then proceeds to tell the jury how to return the verdict forms.

To summarize, the jurors were told that before they return any final verdicts, they must follow these procedures: if they reach a unanimous verdict of guilty of first degree murder, they should return the signed verdict form. If they cannot reach a unanimous verdict as to first degree murder, they must inform the court, because the court cannot accept a verdict of guilty of second degree murder unless the jury unanimously renders a verdict of not guilty of first degree murder. Likewise, if they find the defendant not guilty of first degree murder but cannot reach a unanimous verdict on second degree murder, they should inform the court, because the court cannot accept a verdict of guilty

of voluntary manslaughter unless the jury renders a verdict of not guilty of first and second degree murder.¹

2. The Court's Response to Jury Questions

After deliberating for about seven hours, the jury submitted a note to the trial court, asking: "In Re: CALJIC 8.71.[²] 1. We are not unanimous to 1st degree. 2. We cannot reach agreement on this issue."

¹ This portion of CALJIC No. 8.75, as given to the jury, states:
"Before you return any final or formal verdicts, you must be guided by the following:

"1. If you unanimously find the defendant guilty of first degree murder, as to Count one, your foreperson should sign and date the corresponding guilty form. All other verdict forms as to lesser crimes should be left unsigned.

"2. If you are unable to reach a unanimous verdict as to the charge in Count one of first degree murder, do not sign any verdict forms as to that Count, and report your disagreement to the court.

"3. The court cannot accept a verdict of guilty of second degree murder unless the jury also unanimously finds and returns a signed verdict form of not guilty as to murder of the first degree.

"4. If you find the defendant not guilty of murder in the first degree as to Count one, but cannot reach a unanimous agreement as to murder of the second degree, your foreperson should sign and date the not guilty murder in the first degree form, and should report your disagreement to the court. Do not sign any other verdict forms.

"5. If you unanimously find the defendant not guilty of first degree murder, but guilty of second degree murder, your foreperson should sign and date the corresponding verdict form. Do not sign any other verdict forms as to lesser crimes.

"6. The court cannot accept a verdict of guilty of voluntary manslaughter unless the jury also unanimously finds and returns a signed not guilty verdict form as to both murder of first degree and murder of the second degree.

"7. If you unanimously find the defendant not guilty of murder in the first degree, and not guilty of murder in the second degree, but are unable to unanimously agree as to the crime of voluntary manslaughter, your foreperson should sign and date the not guilty form for first and second degree murder, and you should report your disagreement to the court."

The trial court sent the jury a response stating: "Please refer to CALJIC 8.71 and 8.75. *You may find it to be productive to consider and reach tentative conclusions on the charged and lesser crimes before reaching any final verdicts.* By doing so, you may be able to return to Count One (1st Degree Murder) and reach a unanimous verdict at that time." (Italics added.)

Later, the jury sent another note, asking: "If the jury could agree to a verdict of 2nd degree, without unanimously agreeing to a verdict of not guilty to 1st degree . . . would this be acceptable? If not what is our next option?"

The court responded: "The jury is precluded from returning a verdict on a lesser offense without also returning a verdict on the greater offense of 1st Degree Murder in Count One" The court also responded to jury questions regarding the definitions of the terms "careful," "deliberate," and "deliberately" pertinent to first and second degree murder.

B. *Analysis*

1. *Instructional Issues*

CALJIC No. 8.75 expressly tells the jurors they "have discretion to choose the order in which in which [they] evaluate each crime" and that they "may find it productive to consider and reach tentative conclusions on all charged and lesser crimes before reaching any final verdicts." This language in CALJIC No. 8.75 is derived from *People*

² CALJIC No. 8.71 instructs the jurors if they find murder but have doubt whether the killing was first or second degree, they must give the defendant the benefit of the doubt and find second degree murder.

v. Kurtzman (1988) 46 Cal.3d 322, 336, and removes the concern expressed in that case that a former version of the instruction might confuse the jurors as to the distinction between determining the final verdict on an offense versus merely considering the offense. Challenges to CALJIC No. 8.75 have been repeatedly rejected by the courts. (*People v. Nicolaus* (1991) 54 Cal.3d 551, 580; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1209.)³

Further, CALJIC Nos. 8.72, 8.73, and 8.74 implicitly require the jury to consider *all* the charged offenses in order to follow the terms of these instructions (i.e., the jury should give the defendant the benefit of any doubt as between second degree murder and manslaughter; should consider provocation as reducing homicide to manslaughter or removing the elements of deliberation or premeditation; and should agree on which offense was committed before returning a verdict).

It is clear from the instructions that the only restrictions placed on the jurors under CALJIC No. 8.75 pertain to the *returning of a final verdict*, i.e., requiring that they must first acquit on a greater offense before they can return a verdict on a lesser offense. Nothing in the instructions suggested that the restriction on returning final verdicts limited the jurors' right to *consider* the offenses in any order they chose.

³ In *Kurtzman*, the trial court erroneously answered a jury question by stating that the jury must decide second degree murder before *considering* voluntary manslaughter. (*People v. Kurtzman, supra*, 46 Cal.3d at p. 328.) Supreme Court cases subsequent to *Kurtzman* found no error in CALJIC No. 8.75 (apparently even before it was revised in response to *Kurtzman*), under circumstances where there was no such misdirection by the trial court. (*People v. Hunter* (1989) 49 Cal.3d 957, 976.)

Consistent with the instructions, the trial court's responses to the jurors' questions properly told them they could consider the charged and lesser crimes before reaching any final verdicts, but they could not return a verdict on a lesser offense without also returning a verdict on a greater offense. The second question from the jurors, asking if they could render a verdict on second degree murder without a verdict on first degree murder, suggests they were discussing a lesser offense even though they had not decided a greater offense.

Aitken asserts that after the jurors indicated they could not reach agreement on first degree murder, the trial court should have only told them to consider the lesser offenses, not the charged offense of first degree murder that they could not agree on. This is what the trial court had initially proposed doing, but then changed its mind after discussion with counsel. We see nothing improper in the trial court's response, which directly reiterated the language in CALJIC No. 8.75 that the jury may want to "consider and reach tentative conclusions on all charged and lesser crimes before reaching any final verdicts." The point of the instruction and the court's reiteration thereof was to encourage the jury to deliberate on *all* the offenses before reaching final verdicts. (See *People v. Kurtzman*, *supra*, 46 Cal.3d at p. 336.)

In sum, contrary to Aitken's argument, there is nothing in the instructions or the court's responses that could have misled the jurors to believe they could not consider voluntary manslaughter unless they first reached a verdict of acquittal on the higher offenses. There was no instructional error.

2. *Constitutional Issues*

Aitken also argues that federal constitutional due process rights under the Fifth, Sixth, and Fourteenth Amendments and the prohibition against cruel and unusual punishment under the Eighth Amendment are violated if the jury is not specifically instructed to consider the lesser offenses before reaching a verdict on the greater offenses.⁴ In *People v. Mickey* (1991) 54 Cal.3d 612, 673, our Supreme Court rejected a constitutional challenge to the procedure which allows a trial court to place restrictions on the returning of verdicts while not precluding the consideration of lesser offenses. The court reasoned the instructions would not be construed by the jury to interfere in any significant way with its consideration of the evidence. (*Ibid.*)

Although the court in *Mickey* did not expressly consider Aitken's argument that the jury must be affirmatively told to consider lesser offenses, its rationale is applicable here. The jurors in the case before us were instructed in the language of CALJIC No. 8.74: "Before you may return a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or not guilty, but also, if you should find him guilty of an unlawful killing, you must agree unanimously whether he is guilty of murder of the first degree or murder of the second degree or voluntary manslaughter." Furthermore, the jurors were given lengthy instructions explaining the differences between the three offenses. They were told in CALJIC No. 8.75 that they had discretion to consider the

⁴ The instruction he contends is constitutionally mandated states: "You should consider the lesser offenses before reaching a verdict upon the greater."

order in which they would evaluate "*each crime* and consider the evidence pertaining to it." (Italics added.) Reasonably intelligent jurors would understand they should consider the evidence presented in light of *all* the instructed-upon offenses to determine which offense was committed. No constitutional violation occurred.

II. *Evidence Code Section 1109*

Aitken challenges the constitutionality of Evidence Code section 1109, which gives the trial court discretion to admit evidence of past acts of domestic violence in domestic violence cases. He concedes his arguments have been rejected by the courts (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1309-1313 [rejection of equal protection and due process challenges to Evidence Code section 1109]; cf. *People v. Falsetta* (1999) 21 Cal.4th 903, 910-922 [rejection of due process challenge to comparable Evidence Code section 1108 pertaining to prior sex offenses]), but raises the issue for purposes of preserving it for California Supreme Court or federal court review.

Given his concession and our agreement with the reasoning in *Jennings*, we summarily reject his arguments.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

KREMER, P. J.

O'ROURKE, J.